No. 22021

In the

United States Court of Appeals

For the Ninth Circuit

VITO J. LA TORRE,

Appellant,

vs.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, AFL-CIO, an unincorporated association; CALIFORNIA STATE COUNCIL OF CARPENTERS, an unincorporated association; BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, an unincorporated association; OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO, an unincorporated association; BUILDING AND CONSTRUCTION TRADES COUNCIL OF SANTA CLARA AND SAN BENITO COUNTIES, an unincorporated association; and STATE BUILDING AND CONSTRUCTION TRADES COUNCIL OF CALIFORNIA, an unincorporated association,

Appellees.

Appeal from the United States District Court
for the Northern District of California

Appellant's Opening Brief

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JURISDICTIONAL STATEMENT

This is an appeal from judgments entered on February 28, March 2, March 8, and March 14, 1967, by the United States District Court for the Northern District of California, Southern Division, pursuant to an order entered on February 20, 1967, quashing service on certain defendants and denying plaintiff's motion to file an amended complaint to state the true names of defendants designated in the original complaint as Black Union, Blue Union, Red Union, Green Union, Brown Union and Yellow Union (R. 470-472). Plaintiff filed, on June 8, 1967, a timely Notice of Appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Plaintiff filed a complaint for damages for secondary boycott pursuant to Section 303 of the Labor Management Relations Act, 1947, as amended by the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 187), on January 30, 1962. Named as defendants were certain specified labor organizations (still parties to the case in the District Court) and six other labor organizations designated by fictitious names (R. 1). Plaintiff, at the time of the filing of the original complaint, did not know the true names of these six defendants and prayed for leave to amend his complaint to set forth the true names when they were ascertained (R. 3). Plaintiff had difficulty learning the names of those defendants because of prolongation of discovery procedures by other defendants. It is that prolongation that the District Court has given the defendants the advantage of in quashing service when they were finally identified and served.

On August 30, 1962, plaintiff received partial answers to interrogatories which included the names of approximately

hirty labor organizations, including five of the six appellees, n a context which made it impossible to ascertain what each rganization's participation, if any, had been in the events lleged in the complaint. The name of the sixth defendant vas mentioned in the balance of answers to interrogatories iled October 2, 1962, in a similar context (R. 55).

As of July 23, 1963, plaintiff, being still uncertain which rganizations among the plethora named in the answers o interrogatories had actually participated in the events lleged in the complaint, filed a motion for an order to compel further answers (R. 78), which motion was granted on August 14, 1963 (R. 81). In the further answers (not filed until October 13, 1963) counsel for defendant Monterey County Building and Construction Trades Council included n insert which should have been included in the answers iled a year before (R. 89). This insert gave plaintiff its irst confirmation that the Building and Construction Trades Department, AFL-CIO, (R. 91) the Operative Plasterers and Cement Masons International Association of he United States and Canada, AFL-CIO, the International Hod Carriers, Building and Common Laborers Union of America, AFL-CIO, and the Building and Construction Trades Council of Santa Clara County (R. 92) had each been present *on its own behalf* at a meeting where some of he events alleged in the complaint occurred or were discussed. Prior mention of the two international unions had hown only that two of the twenty-one local unions which ere members of the Monterey County Building and Construction Trades Council were affiliated with them (R. 38). Prior mention of the Building and Construction Trades Department, AFL-CIO, had shown only that defendant Monterey County Council and the Building and Construction Trades Council of Canta Clara County had charters

granting territorial jurisdiction to their respective areas from the national organization (R. 43).

Within three years after the filing of the complaint, to wit, on September 21, 1964, California State Council of Carpenters was served with summons and complaint, identifying it as Black Union named in the original complaint (R. 100). (This defendant's answer was filed December 3, 1964.) At the time of such service the information then available to plaintiff was used to attempt to obtain service on another of the defendants. However, the description which plaintiff had was so inadequate that only the California State Council of Carpenters could be served, the United States Marshal being unable to effect service on the other defendant because of the inadequate description (R. 212).

Because of the difficulty the marshal had, plaintiff sent more interrogatories to defendant Monterey County Council on September 16, 1964, in an attempt to discover the identity of persons attending a certain meeting pertaining to the events alleged in the complaint. Answers were filed to these interrogatories on November 25, 1964, but were unproductive of any information which would have enabled plaintiff to ascertain the identity or activities of undisclosed defendants (R. 102, 103).

Thereupon plaintiff promptly noticed oral depositions of four of defendant Monterey County Council's officers, which were taken on January 6, 1965 (R. 108, 111, 114, 117). Through these depositions, in combination with the previous answers to written interrogatories, plaintiff was able to identify the defendants with enough particularity for the marshal to effect service on them.

The remaining five defendants were served on the following dates: (1) Building and Construction Trades De-

partment, AFL-CIO — May 8, 1965 (R. 139); (2) State Building and Construction Trades Council of California — May 19, 1965 (R. 140); (3) Building and Construction Trades Council of Santa Clara and San Benito Counties — May 11, 1965 (R. 141); (4) Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO — May 20, 1965 (R. 142); (5) International Hod Carriers, Building and Common Laborers Union—May 7, 1965 (R. 143). These defendants were identified as Blue Union, Red Union, Green Union, Brown Union and Yellow Union, respectively.

After several months the defendants moved to dismiss on the grounds that the statute of limitations had run. The motion was denied on December 9, 1965, the District Court holding that "*in the present context,* the defense of the statute of limitations may more appropriately be asserted by answer than by motion to dismiss." (Emphasis added.) (R. 247-248). *The District Court further specifically reserved the ruling on the statute of limitations defense until time of trial* (R. 248).

On January 17, 1966, the District Court refused to certify its order of December 8, 1965, to permit an interlocutory appeal to be taken, holding that there was no controlling issue of law involved, but merely an application of the "well-established rule that the application of the statute of limitations to a given case ought not to be decided on a motion to dismiss when such application raises factual issues." (R. 299). Defendants then renewed their motion to dismiss in their Partial Pre-Trial Statement of November 25, 1966 (R. 316).

The District Court through another judge reversed itself by its order of February 20, 1967, quashing service of summons and denying plaintiff's motion to amend to identify

properly the fictitiously-named defendants on the ground that the statute of limitations had run before they were served (R. 470). It is from the judgments based on this reversal of the prior order that plaintiff appeals.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred by its order of February 20, 1967, in that the only proper remedy for defendants to pursue was a motion to dismiss for want of prosecution under Rule 41(b) instead of a motion for summary judgment.

2. The District Court erred by its order of February 20, 1967, in holding the action had never been "commenced" against these defendants.

3. Even if the statute of limitations were applicable, the District Court erred by its order of February 20, 1967, in that the issues considered were issues of fact which could be resolved only after trial.

4. The District Court erred by its order of February 20, 1967, and its order of April 26, 1967, in treating the California State Council of Carpenters, which had been served eight months earlier than the others and which had entered a general appearance by filing its answer, in the same manner as the other of these defendants.

QUESTIONS PRESENTED

1. Was a motion to dismiss for want of prosecution under Rule 41(b) the only available remedy for defendants?

2. Had an action been commenced against these defendants?

3. Were the issues which were raised issues of fact to be resolved only after trial?

4. Should the California State Council of Carpenters have been treated in the same manner as other defendants?

ARGUMENT

I. Rule 41(b) Provided the Only Remedy for Defendants.

Federal Rule of Civil Procedure 41(b) states:

> "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him."

This rule is the only rule applicable to what defendants allege that plaintiff has done, i.e., failed to prosecute, in this instance by not effecting service of process within a proper (but unspecified) time after the filing of the complaint. Defendants have simply misconstrued the statute of limitations and have failed to recognize the only procedure open to them. The statute of limitations concerns only the commencement of an action and is governed by Rule 3; it has nothing to do with the service of process. If defendants wish to seek relief on the ground that service of process was not effected within a proper time, Rule 41(b), which they have never invoked, is their sole remedy. They have mistakenly assumed that the statute of limitations has something to do with service of the summons, but it does not under the federal rules.

Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gas Co., 347 F.2d 921 (8th Cir., 1965), clearly holds that Rule 41(b) is the proper remedy to protect a defendant against any unreasonable delay in the service of process. The court stated at page 923:

> "It appears to us that Rule 41(b) provides adequate protection against unreasonable delay in serving process or in prosecuting the suit.
>
> If Rule 3 is read in connection with other rules, no support is found for defendant's position [reasonable diligence in obtaining service of process is required, in addition to the filing of a complaint, to toll the statute of limitations]. Rule 4(a) makes it the duty of the

clerk to issue summons forthwith after the filing of the complaint and to deliver process to the marshal for service. Rule 4(c) provides for service by the marshal. Thus the duties with respect to obtaining service are placed upon federal officials, not upon the plaintiff."

II. The District Court Erred by Its Order of February 20, 1967, in Holding That the Action Had Never Been "Commenced" Against These Defendants.

An action is commenced in a Federal District Court by the filing of a complaint. Nothing else is required. Federal Rule of Civil Procedure 3 states:

> "A civil action is commenced by the filing of a complaint with the court."

In *Moore Co., supra,* the court held that the filing of a complaint, without more, satisfied the burden of Rule 3. The court explained at page 922:

> "Such rule in our view unmistakably states in plain, clear, well-understood and unambiguous language that an action is commenced by filing the complaint. The rule sets forth no additional requirements or conditions."

Support for this holding was found in the Rules Committee Notes, quoted by the court at page 923:

> "When a *federal* or *state* statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limita-

tions. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising. Original Committee Note of 1937 to Rule 3, 2 Moore, Federal Practice §3.01[2]." (Emphasis added.)

While this particular case involved a federal statute of limitations, it is apparent from the quoted material from Original Committee Note of 1937 to Rule 3 that no distinction between federal and state statutes of limitations is to be made in this context. For other cases holding that federal law governs the issue of when a statute of limitations begins to run, see: *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959); *Isaaks v. Jeffers,* 144 F.2d 26 (10th Cir. 1944); *Gallagher v. Carroll,* 27 F.Supp. 568 (D.C.N.Y. 1939); *Krisor v. Watts,* 61 F.Supp. 845 (D.C. Wis. 1945).

In both *Gallagher* and *Krisor,* the courts held that the action was commenced within the limitations period by the filing of the complaint, even though there was no service of process until after the limitations period had expired. In *Gallagher,* as well as in the present case, the defendant attempted to rely on the proposition that a civil action is commenced by the service of summons. Defendant in *Gallagher* relied on New York Civil Practice Act, §218, which provides that a civil action is commenced by the service of summons. Defendants in this case attempt to rely on California Code of Civil Procedure, §581(a), which provides a three-year time limit for the service and return of summons. However, the court in *Gallagher,* in holding that federal law governed, specifically rejected defendant's contention that service of process is required to commence an action in a federal court.

> "The language of the Rule is too plain to admit of discussion or to leave any doubt that it was the purpose of the Supreme Court in reporting the Rules to Congress, and of the latter in sanctioning them, that an action should be deemed to have been commenced by the filing of the complaint; the issuance of the summons to the marshal was the required ministerial act of the Clerk; . . ." *Gallagher v. Carrol,* supra, p. 570.

Carvalho, et al. v. Doe, et al., 7 F.R.D. 469 (D.C. Hawaii 1947), was an action brought under the Fair Labor Standards Act against John Doe and Richard Roe, co-partners doing business in Hawaii under the name and style of Byrne Organization. The complaint was filed on November 15, 1945, and service was obtained two and one-half years later on one of the partners. The defendants claimed that the delay was unreasonable on its face, but the plaintiff did not find a partner in Hawaii when the complaint was filed. The main office of defendant was in Washington, D.C., and the Hawaiian office refused to reveal the names of the partners. Although one partner was in Hawaii for thirteen months of the period involved, and the plaintiff could have obtained the names of the partners from Washington, D.C., the court held that, with due diligence remaining in balance, and in the absence of a clear showing of the plaintiff's lack of diligence, Rule 3 would be literally applied, for as soon as the identity of a partner was revealed, the plaintiff transmitted the information to a marshal who made service. Similarly in this case when plaintiff was able to discover the identity of the fictitious defendants, plaintiff transmitted the information to the marshal who made service. It is therefore apparent that since the filing of a complaint "commences" an action in Federal court, the statute of limitations was satisfied by the filing of the complaint on January 30, 1962, well within the three-year period.

The reason given by Judge Wollenberg for his order of February 20, 1967, was in essence plaintiff's failure to effect service of process within three years from April 3, 1962. His finding that the defendants "would not have been put on 'notice' from the face of the original and first amended complaint that they were the 'fictitious' defendants named in those complaints" (R. 471) is irrelevant. They would have been put on such notice at the time of service by the summons itself identifying each of them as one of the "fictitious" defendants, just as California State Council of Carpenters was so put on notice (R. 100). The Court's statement that "(plaintiff) did nothing to bring them into the action until after the three-year limitation period" (R. 471, 472) is merely another way of saying that there was no service of process during that time. The timely filing of the complaint cannot be challenged.

If an action is not commenced by the filing of the complaint, without any consideration of a defendant's later actions, a premium is put on the ability of a defendant or group of defendants acting in concert deliberately to hinder and to obfuscate the discovery procedures. By that means a statute of limitations, designed to prevent plaintiffs from gaining an unfair advantage over defendants by not instituting action in time for defendant to preserve his evidence, would be perverted into a device encouraging one defendant to obstruct the orderly pre-trial exchange of information between the parties while the statute ran against another.

One of the issues of fact in this case which can be resolved only at trial is the exact nature of the relationship between Monterey County Building and Construction Trades Council and the fictitious defendants. If the facts at the trial show that the fictitious defendants actually knew of the

action by information received through defendant Monterey County Council and acted in concert with Monterey County Council to hinder discovery of their true identities, estoppel would prevent the defendants from pleading the statute of limitations. This rule is the same under both federal and California law.

Falk v. Levine, 66 F.Supp. 700 (D.C. Mass. 1946);
Armstrong v. Avco Mfg. Co., 137 F. Supp. 680 (D.C. Del. 1955);
R. J. Reynolds Tobacco Co. v. Hudson, 314 F.2d 776 (5th Cir. 1963);
Estate of Pieper, 224 C.A.2d. 670 (1964);
Casey v. Anschutz, 252 A.C.A. 9 (1967).

III. Even if the Statute of Limitations Were Applicable, the District Court Erred by Its Order of February 20, 1967, in That the Issues Considered Were Factual and, Being Disputed, Should Be Resolved Only After Trial.

Although only defendant Building and Construction Trades Council of Santa Clara and San Benito Counties ever filed a motion for summary judgment (R. 149), since the motions to dismiss filed by the other defendants presented matters outside the pleadings, by way of affidavits, the motions were treated as for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and were disposed of pursuant to Rule 56.

In the first order (December 8, 1965) the District Court stated:

> "It appearing to the Court that, in the present context, the defense of the statute of limitations may more appropriately be asserted by answer than by motion to dismiss (citing cases);
>
> It Is Ordered that the motions to dismiss be, and the same hereby are, Denied;

> It Is Further Ordered that the affirmative defense of the statute of limitations may be asserted by said defendants and set forth appropriately in their answers herein, *with the ruling thereon reserved until time of trial.*" (Emphasis added.)

Defendants then moved, for the purpose of permitting immediate appeal pursuant to 28 U.S.C. 1292(b), that the District Court certify the following proposed order to the effect that it involved a controlling question of law as to which there was substantial ground for difference of opinion and that immediate appeal from the order might materially advance the ultimate termination of litigation. By its order of January 13, 1966, the District Court stated:

> ". . . This court's order of December 8, 1965 did not involve such a question ['a controlling question of law']. The only legal principle involved in that order was the well-established rule that the application of the statute of limitations to a given case ought not to be decided on a motion to dismiss when such application raises factual questions. Since this court was, and is, of the opinion that the application of the three-year statute of limitations which is applicable herein does raise factual questions the motions to dismiss were denied, but defendants were explicitly left free to raise the statute of limitations as an affirmative defense at trial. This ruling clearly did not involve the kind of controlling question of law envisaged by §1292(b)."

After considering defendants' renewed motion to dismiss and plaintiff's motion to amend, the District Court then through another judge reversed itself by its order of February 20, 1967, on the ground that the statute of limitations had run (R. 470). Since defendants' renewed motion to dismiss was treated as a motion for summary judgment, as their initial motion to dismiss had also been treated, the

Court had to find beyond any doubt that no issue of fact had been raised by the pleadings and affidavits. To reach such a decision, the Court of necessity had to find beyond any doubt that every one of the following questions must be answered adversely to plaintiff:

1. Did plaintiff, in including fictitious defendants, do so because he had information and belief that other unions were involved but was then unable to state their identity?

2. Were the defendants who were served as fictitious defendants in fact those which plaintiff referred to in the complaint?

3. Were the defendants who were served as fictitious defendants undisclosed principals in the acts which are alleged to give rise to the cause of action?

4. Was the delay in service upon the ficitious defendants caused by delays on the part of the named defendants in complying with discovery, whether with or without the intention to frustrate identifying the fictitious defendants?

5. Was delay justified during the pendency of proceedings before the National Labor Relations Board and its defense of its order before the Court of Appeals?

6. Did defendants have actual knowledge of the filing of this lawsuit from a time shortly after the filing and service upon named defendants so that they suffered no genuine surprise or other prejudice by a delay in identifying them and serving them?

Each of these questions involves an issue of fact concerning which there is evidence to be produced which is not in the record. Only after hearing all the evidence could a court properly decide whether there was a lack of due diligence in prosecuting the case.

The Court, upon hearing the motions for summary judgment, was entitled to decide only questions of law. Summary

judgment could not properly be granted where the pleadings and affidavits showed a genuine issue as to any material fact.

Fountain v. Filson, 336 U.S. 681 (1949);

Gillis v. Miners and Merchants Bank of Alaska, 271 F.2d 163 (9th Cir. 1959);

Brawner v. Pearl Assur. Co., 267 F.2d 45 (9th Cir. 1958);

Koepke v. Fontecchio, 177 F.2d 125 (9th Cir. 1949).

Further, if there is even the slightest doubt that a factual issue has been raised, such doubt must be resolved against the moving party because summary judgment can be granted only when the moving party is entitled to judgment as a matter of law.

Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959);

Consolidated Elec. Co. v. U.S. for Use and Benefit of Gough Industries, Inc., 355 F.2d 437 (9th Cir. 1966).

Even had defendants used the proper remedy, i.e., Rule 41(b), the District Court would still have been faced with the necessity of a trial to determine these factual issues.

In its second order the District Court apparently relied on the fact that the last overt act of picketing occurred on April 3, 1962, for its determination that the statute of limitations had run (R. 470). *Defendants'* contention that January 30, 1962, the date of the filing of the original complaint, was the last date upon which any overt act causing damage could have occurred, was the only allegation of the date when the statute of limitations would begin which was before the District Court at the time of its first order of December 8, 1965. Thus, even though it was apparently

assumed that the limitations period began to run on January 30, 1962, the Court nonetheless in its first ruling denied defendants' motion to dismiss because a factual issue existed. It is therefore clear that the factual issue referred to by the Court in its first order (December 8, 1965) was defendants' alleged concealment of their activities, and not when the limitations period began to run.

In the context of the relationship among all of the defendants, the question of notice or knowledge of the true identity of the fictitious defendants is also clearly a question of fact. Judge Wollenberg, in overruling Judge Harris, based his finding that the statute had run on the ground that plaintiff "had notice of the existence of these new parties as far back as August, 1962, but did nothing to bring them into the suit until after the three-year limitation period" (R. 471-472). The facts do not support that finding in the unequivocal way required by law for the summary disposition of the issues without trial. For example, in answers to interrogatories Local Union No. 690 and Local Union No. 292 were said to be "*of* the Hod Carriers, Building and Common Laborers Union of America" and Local Union No. 337 was said to be "*of* the Operative Plasterers and Cement Masons International Association". The word "of" does not signify any particular relationship, but seems more likely to connote affiliation or membership as *descriptio personae* than a representative capacity.

The local unions mentioned in answers to interrogatories are but a few of the members of Monterey County Building and Construction Trades Council (R. 38). Building and Construction Trades Department, AFL-CIO, was said to have granted a charter to the Monterey County Building and Construction Trades Council, as well as to "the Building and Construction Trades Council with territorial juris-

liction over Santa Clara County" (R. 43). These references lso appear to be merely *descriptio personae,* without any int of participation. State Building Trades Council was nentioned in a motion to send it a report on the proposals nade by the Monterey Council (R. 48). Like the others, his showed no participation and could not reasonably have ompelled plaintiff to become aware that it was one of the ictitiously named defendants.

Thus, while it is literally true that plaintiff had some cant "notice of the existence of these new parties as far ack as August, 1962", it is immediately apparent from the ontext in which such notice appeared that it was notice of *xistence* only, not of participation as principals. Knowldge of the existence of such organizations (which plaintiff ad no need of answers to interrogatories to tell him) did ot give any notice of the part any of the defendants played. his is particularly true of the two international unions nentioned only as organizations to which two of the twenty-ne members of the Monterey County Council also belonged. t would appear that in order for plaintiff to have been afe under the District Court's second order (R. 470-472), laintiff would have had to name as defendants, in addition the ten named defendants, the other thirteen members f the Monterey County Council, plus each International ith which a Local on the list was affiliated, plus every other ocal and International and inter-union councils mentioned the Partial Answer to Interrogatories (R. 36-52), a total f some thirty-five organizations. Even this might not have xhausted the list. The District Court's second order would equire completion of even more extensive discovery of a fficult nature before the action could be "commenced" s to these defendants. The alternative would be to name very labor organization which might possibly be related

to those identifiable with certainty at the outset — a procedure wholly inconsistent with the spirit of the federal rules.

IV. The District Court Erred by Its Order of February 20, 1967, and Its Order of April 26, 1967, in Treating the California State Council of Carpenters in the Same Manner as the Other Defendants.

Plaintiff received notice of this defendant's existence in October, 1962 (R. 55). Service of the summons and complaint identifying it as the Black Union named in the complaint was made on September 16, 1964, well within the three-year limitations period, regardless of when the cause of action accrued (R. 100). Defendant filed its answer on December 3, 1964, also within three years from the earliest possible date, thus eliminating any doubt as to whether or not it had "notice" that an action was being prosecuted against it (R. 104). The reason stated by Judge Wollenberg for refusing to allow plaintiff to amend the complaint to identify this defendant was lack of diligent prosecution by plaintiff "in that he had notice of the existence of these new parties as far back as August, 1962, but did nothing to bring them into the action until after the three-year limitation period." (R. 471, 472). Judge Wollenberg was mistaken. The statement is simply wrong. The facts are irrefutably to the contrary. California State Council of Carpenters was brought into the action through service of process within the three-year limitation period, and even filed its answer within that period. Whether or not Judge Wollenberg was right as to any other defendants, the judgment in favor of this one must be reversed. It had no basis whatsoever for its motion, but was erroneously lumped together with the others by the District Court.

CONCLUSION

Under Rule 3 the action in the instant case was "commenced" by the filing of the complaint on January 30, 1962. Defendants' misconceived arguments concerning the statute of limitations, and the District Court's adoption of them, ignore the only available remedy, a motion under Rule 41(b). If the motion were deemed to have been under that rule, the District Court erred by refusing to allow a trial on the factual issues of defendants' conduct. The same would be true if a motion for summary judgment had been appropriate. The statute of limitations is simply irrelevant to the timeliness of service of summons. The order of December 8, 1965, denying defendants' motion to dismiss and specifically reserving a ruling on the statute of limitations question should be followed.

The judgments should be reversed and the case permitted to go to trial, allowing the defendants who are appellees on this appeal (other than California State Council of Carpenters) to raise by answer the issue of due diligence in prosecution.

Dated, San Francisco, California, August 30, 1968.

Respectfully submitted,

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